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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1951

No. 477

PAUL S. GEUSS AND ERICH FLEISCHMANN,
Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 477

COMMONWEALTH OF PENNSYLVANIA

vs.

PAUL S. GEUSS AND ERICH FLEISCHMANN,
Appellants,

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

Appellants file their statement disclosing the basis upon which they contend that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question pursuant to Rule 12 (1) of the Rules of the Supreme Court of the United States, as amended April 6, 1942.

Opinion Below

The court below wrote an opinion. It is reported in 81 Atl. 2d 552. The opinion of the Supreme Court is contained in Appendix A to this statement, which is made a part hereof. The Superior Court opinion adopted by the Su-

preme Court, is reported in 168 Pa. Super. 22, 76 Alt. 2d 500. [131a-140a] [1]

Questions Presented

I

Does ordinance number 6068 of the City of Allentown, on its face and as construed and applied, abridge appellants' rights of freedom of speech and freedom of worship, contrary to the First and Fourteenth Amendments to the Constitution of the United States?

II

Is ordinance number 6068 of the City of Allentown, zoning the use of sound devices in the city so as to exclude it from the business district while permiting it in other areas of the city, an unreasonable, arbitrary, discriminatory and capricious exercise of the police power, so as to abridge the constitutional rights of the appellants, contrary to the First and Fourteenth Amendments to the Constitution of the United States?

Each of these questions was raised by motion to dismiss in the Court of Quarter Sessions. [114a-116a] These questions were adversely determined by the Court of Quarter Sessions. [128a] The questions were properly raised in the Superior Court by filing in the Quarter Sessions Court a statement of questions to be argued. [129a-130a] These questions were adversely determined by the Superior Court. [131a-140a] They were presented and determined by the Supreme Court of Pennsylvania. The entire opinion of the Superior Court which was relied upon

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[1] Numbers appearing herein in brackets refer to pages of the printed record filed herein.

by the Supreme Court of Pennsylvania has been printed as a part of the printed record filed in this case. [131a-140a]

Statutes Involved

This case draws into question the validity of an ordinance of Allentown, Pensylvania, reading as follows:

AN ORDINANCE

REGULATING AND PROHIBITING CERTAIN USES OF SOUND TRUCKS AND AMPLIFYING DEVICES PROVIDING FOR THE REGISTRATION AND ISSUANCE OF PERMITS FOR THE USE OF SOUND TRUCKS FOR NON-COMMERCIAL PURPOSES AND PROVIDING PENALTIES FOR THE VIOLATION OR VIOLATIONS THEREOF.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF ALLENTOWN:

SECTION 1. Definitions

(a) "Person". The word "person" as used herein shall include the singular and the plural and shall also mean and include any person, firm, corporation, association, club, partnership, society or any other form of association or organization.

(b) "Sound truck". The words "sound truck" as used herein shall mean any motor vehicle, or horse-drawn vehicle, having mounted thereon, or attached thereto, any sound amplifying equipment.

(c) "Sound amplifying equipment". The words "sound amplifying equipment" as used herein shall mean any machine or device for the amplification of the human voice, music or any other sound. "Sound amplifying equipment" as used herein shall not be construed as including standard automobile radios when used and heard only by occupants of the vehicle in which installed or warning devices on authorized emergency vehicles or horns or other warning devices on other vehicles used only for traffic safety purposes.

SECTION 2. Non-commercial use of sound-trucks.

(a) Registration required—No person shall use, or cause to be used, a sound truck with its sound amplify-

ing equipment in operation for non-commercial purposes in the City of Allentown before filing a registration statement with the City Clerk in writing. This registration statement shall be filed in duplicate and shall state the following:

(1) Name and home address of the applicant.

(2) Address of place of business of applicant.

(3) License number and motor number of the sound truck to be used by applicant.

(4) Name and address of person who owns the sound truck.

(5) Name and address of person having direct charge of sound truck.

(6) Names and addresses of all persons who will use or operate the sound truck.

(7) The purpose for which the sound truck will be used.

(8) A general statement as to the section or sections of the City in which the sound truck will be used.

(9) The proposed hours of operation of the sound truck.

(10) The number of days of proposed operation of the sound truck.

(11) A general description of the sound amplifying equipment to be used.

(12) The maximum sound producing power of the sound amplifying equipment to be used in or on the sound truck. State the following:

(a) The wattage to be used.

(b) The approximate maximum distance for which sound will be thrown from the sound truck.

(b) Registration statement amendment—all persons using or causing to be used, sound trucks for non-commercial purposes shall amend any registration statement filed pursuant to Section 2 (a) within forty-eight (48) hours after any change in the information therein furnished.

(c) Registration and identification — The City (Clerk) shall return to each applicant under Section 2

(a) of this ordinance, one copy of said registration statement duly certified by the City (Clerk) as a correct copy of said application. Said certified copy of the application shall be in the possession of any person operating the sound truck at all times while the sound truck's sound amplifying equipment is in operation and said copy shall be promptly displayed and shown to any policeman of the City of Allentown upon request.

(d) Regulations for use—Non-commercial use of sound trucks in the City of Allentown with sound-amplifying equipment in operation shall be subject to the following regulations:—

(1) The only sounds permitted are music or human speech.

(2) Operations are permitted for four (4) hours each day, except on Sundays and legal holidays when no operations shall be authorized. The permitted four (4) hours of operation shall be between the hours of 11:30 A.M. and 1:30 P.M. and between the hours of 4:30 P.M. and 6:30 P.M.

(3) Sound amplifying equipment shall not be operated unless the sound truck upon which such equipment is mounted is operated at a speed of at least ten (10) miles per hour except when said truck is stopped or impeded by traffic. Where stopped by traffic the said sound amplifying equipment shall not be operated for longer than one minute at such stop.

(4) Sound shall not be operated within one hundred (100) yards of hospitals, schools, churches, libraries, fire stations or courthouse.

(5) No sound truck with its amplifying device in operation shall be operated on the following streets between the points designated:

Union Street from Lehigh River to Eighth Street
Walnut Street from Fifth Street to Twelfth Street
Hamilton Street from the Lehigh River to Twelfth Street
Linden Street from Front Street to Twelfth Street
Turner Street from Fifth Street to Tenth Street

Union Boulevard from City Line to the Lehigh River
Tilghman Street from the Lehigh River to Nineteenth Street
Hanover Avenue from Lehigh River to City Line
Fifth Street from Union Street to Turner Street
Sixth Street from Union Street to Turner Street
Seventh Street from Union Street to Tilghman Street
Eighth Street from Union Street to Turner Street
Ninth Street from Walnut Street to Turner Street
Tenth Street from Walnut Street to Turner Street
Eleventh Street from Walnut Street to Linden Street
Twelfth Street from Walnut Street to Linden Street
Lehigh Street from Auburn Street to Union Street
and all other half streets and alleys contained within the area of the City of Allentown, bounded on the East by Fifth Street, on the North by Turner Street, on the West by Tenth Street, and on the South by Walnut Street.

(6) The human speech and music amplified shall not be profane, lewd, indecent, or slanderous.

(7) The volume of sound shall be controlled so that it will not be audible for a distance in excess of one hundred and fifty (150') feet from the sound truck and so that the said volume is not unreasonably loud, raucous, jarring, disturbing, or a nuisance to persons within the area of audibility.

(8) No sound amplifying equipment shall be operated with in excess of fifteen (15) watts of power in the last stage of amplification.

SECTION 3. Commercial Advertising by Sound Truck Prohibited.

No person shall operate, or cause to be operated, any sound truck for commercial sound advertising purposes in the City of Allentown with sound amplifying equipment of operation.

SECTION 4. Penalties.

Any person or persons violating any of the provisions of this ordinance shall, upon conviction before

the Mayor or any Alderman of the City of Allentown, be sentenced to pay a fine not exceeding One Hundred ($100.00) Dollars for each offense, with costs, and if the amount of said judgment and costs shall not be paid, said person or persons shall suffer imprisonment in the Lehigh County Prison for a period not exceeding thirty (30) days.

SECTION 5. Separability.

It is the intention of the City Council that each separate provision of this ordinance shall be deemed independent of all other provisions herein, and it is further the intention of the City Council that if any provision of this ordinance be declared to be invalid, all other provisions thereof shall remain valid and enforceable.

Constitutional Provisions Involved

The First Amendment, relied upon in this case, reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The pertinent parts of the Fourteenth Amendment which appellants rely upon read as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Matters Related to Jurisdiction

Timeliness

The judgment of the Supreme Court of Pennsylvania affirming the judgment of the Superior Court was entered June 27, 1951. A petition for reargument was duly filed and considered by the Court below. On September 15, 1951 the petition for reargument was denied. See Appendix B containing the order of denial. The judgment affirming the judgment of the trial court became final on September 15, 1951. *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498. This appeal is duly presented and filed within the 90-day time limit after the judgment became final. The appeal is timely.

Nature of Case

This is a summary proceedings against appellants by the appellee in the Court of Quarter Sessions of Lehigh County at Allentown, resulting in a conviction of the appellants for operating a sound device in the downtown area of Allentown, from which all devices have been excluded by the ordinance.

How Constitutional Questions Raised

The constitutional questions were raised in the petition for appeal from the Alderman's Court to the Court of Quarter Sessions. [6a-19a] Each question raised in the Superior Court and in the Supreme Court of Pennsylvania was raised in a written motion to dismiss filed on trial de novo in the Court of Quarter Sessions. [114a-116a] Each question presented in that court was considered and overruled in a written opinion. [117a-128a] Each holding of the trial court was presented on appeal to the Superior Court and duly assigned as error. [129a-130a] Each federal question presented upon this appeal also was presented

to the Supreme Court of Pennsylvania and by that court denied on the opinion of the Superior Court. See Appendix A of this jurisdictional statement.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code or 28 U. S. C. 1257 (2).

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

Statement of the Case

The Proceedings

These are appeals from judgments affirming the conviction and sentences by the Honorable John H. Diefenderfer for violations of Ordinance No. 6068 Section 2 Paragraph 5 of the City of Allentown, prohibiting the use of sound-amplifying equipment in the downtown business district. [2a] The cases originated in the Alderman's Court of the City of Allentown. By information each appellant, it was charged, "did unlawfully use or cause to be used a sound-amplifying equipment in operation for non-commercial purposes in the City of Allentown by violating City Ordinance #6068 Section 2 Paragraph 5." [4a, 5a]

The cases were tried before the Alderman on June 21, 1949. [21a] The Alderman heard evidence, denied motions to dismiss and convicted the appellants, assessing a fine of one hundred dollars or in default of payment to spend 30 days in the Lehigh County Prison in each case. [21a-23a]

The appellants petitioned for special appeal to the Court

of Quarter Sessions of Lehigh County. [6a-17a] The special appeal was allowed. [1a, 19a] The Alderman filed his transcript. [20a-23a]

The case was taken under advisement and decision reserved. [1a] On November 22, 1949, a motion to dismiss raising each of the grounds presented upon this appeal was filed. [1a, 114a-116a] The case was argued December 5, 1949, after briefs were filed. [1a-2a] The court rendered its opinion, holding that the ordinance was constitutional, holding that the objections were overruled and convicting the appellants. [112a-128a] On March 15, 1950, the appellants were each sentenced to pay a fine of one hundred dollars and costs. [2a] Appeal was taken to the Superior Court, which affirmed. [131a-140a] Thereupon appeal was duly taken to the Supreme Court of Pennsylvania. The case was argued and the Supreme Court of Pennsylvania affirmed on June 27, 1951, the judgment of the Superior Court. Motion for reargument was denied on September 15, 1951.

Facts

Paul Geuss and Erich Fleischmann are ministers of the gospel, being Jehovah's witnesses. [52a-53a, 87a] [2] Erich Fleischmann, as such minister, presides over the church and congregation of Jehovah's witnesses located at 1335 Chew Street, Allentown. [52a-53a] The congregation is engaged in evangelistic work under the direction of the Watch Tower Bible and Tract Society of Brooklyn, New York. That Society sends out missionaries, preachers, evangelists and speakers to advance the message of the Kingdom of God. The ministers and missionaries use literature published by such Society in their preaching work. [52a-53a]

[2] The facts have been succinctly and accurately stated by the trial judge in his opinion. [117a-120a]

There are about 120 persons associated with Fleischmann in such church. The missionary field assigned to such congregation of evangelists comprises the City of Allentown and all of the surrounding territory nearby in Lehigh County. [53a]

The congregation employs the conventional method of preaching and teaching by means of holding regular meetings each week at the church located at 1335 Chew Street, as well as public meetings held weekly. [53a-55a]

The group of ministers also employ the primitive method of preaching and teaching the gospel, which is by calling from door to door and house to house, as well as by distribution of literature upon the public streets and sidewalks of the city particularly in the downtown business district.

In May, 1949, the Allentown congregation of Jehovah's witnesses planned a series of public meetings to be held in the meeting place at 1335 Chew Street. One of such meetings was planned for Sunday, May 15. The subject of the proposed talk was "Why the Bible Has Endured". It was planned by such congregation to advertise the meeting by means of distribution of printed invitations and wearing of placards on the public streets, incidental to the distribution of the "Watchtower" and "Awake" magazines, on Saturday, May 14, 1949. [55a-56a] Incidental to the distribution of the literature and the handing out of the printed invitations, the movable sound-amplifying device was planned to be used. It was planned by the congregation to use an automobile equipped with a microphone and sound-amplifying device to call the attention of the public to the "Watchtower" and "Awake" magazines that were to be distributed and also to invite the hearers to come to the public meeting that was to be held by Jehovah's witnesses on the following Sunday. [56a-57a]

On May 11, 1949, Jehovah's witnesses by letter attempted to register the automobile and movable sound-amplifying device, pursuant to the requirements of Ordinance No. 6068. [59a-60a] The ordinance appears in the record. [107a-111a] The letter was delivered to the City Clerk of Allentown. He referred Jehovah's witnesses to the City Attorney. [59a-60a, 88a-89a] When the appellants talked to Mr. Kohler, he informed them that if they used the sound device in the downtown business district, the prohibited area, they would be arrested. [61a, 89a] After the letter was filed the appellant, Fleischmann, received a telephone call about one of the questions required to be answered by the ordinance which had not been satisfactorily answered. [61a-62a] A new letter was requested by the City Clerk. On May 13, 1949, a new letter was prepared and submitted to the City Clerk. Thereupon the application was accepted for filing and a certificate was issued, showing that the sound device had been registered pursuant to the requirements of Ordinance No. 6068. [63a]

After receiving the certificate of registration, appellants made plans to operate the sound device in the City of Allentown. On Saturday, May 14, 1949, as planned by the appellants, they met in the afternoon for the purpose of operating the sound device between the hours of 4:30 P.M. and 6:30 P.M., the permissible time set in subsection (d) of Ordinance No. 6068. Fleischmann, the presiding minister, met with a number of the missionaries at the church. Because of the heavy downpour of rain, they were delayed in leaving the meeting place and it was about 5:00 o'clock before they started to take their positions on the sidewalks of downtown Allentown. Between 5:00 and 6:00 o'clock several of the missionaries were stationed along the sidewalks of downtown Allentown. Some wore placards advertising the public talk. Others distributed leaflets to the

passers-by, inviting the pedestrians accepting the leaflets to attend the public talk. Others offered the magazines "Watchtower" and "Awake". [63a]

After the other missionaries were on the sidewalks of downtown Allentown, the appellants started using the sound device attached to the passenger car driven by Paul Geuss. [65a] Fleischmann made announcements through the microphone and over the sound device. He announced: "Uncensored News Keeps You Awake. Read Awake Now on the Corner. What Is Man's Hope in This Atomic Age? Read the Watchtower and Be Sure. Hear the Free Bible Lecture 'Why the Bible Has Endured' Tomorrow 3:00 P.M. at the Kingdom Hall of Jehovah's Witnesses, 1335 Chew Street. Are Bible Prophecies Being Fulfilled? Read the Watchtower and Be Sure." [65a-66a]

These announcements were made as the automobile was driven east on Hamilton Street in downtown Allentown. [65a] The policy followed was not to make the announcements in front of hospitals, churches, public buildings and other places of that type. Moreover, the announcements were not made when the automobile was stopped because of traffic. [66a]

When the appellants reached Seventh Avenue, as they traveled along Hamilton Street, they were stopped by Officer Hancharik. [27a, 66a] They were stopped because the officer was of the opinion that they were violating the ordinance by reason of operating a sound truck in the prohibited downtown area. [28a] The officer could first hear the sound of Fleischmann's voice coming from the device as the car approached when it was 50 or 60 feet away. [28a-29a]

When he stopped the car, the officer stated that he had been looking for Geuss and Fleischmann to show up all day, having received instructions from the desk sergeant that

in event he saw a sound truck operating he should apprehend it and bring the operators in. [30a] He arrested them, got into the automobile driven by Genss and directed him to the Police Headquarters at the City Hall. [29a, 68a]

The traffic at Seventh and Hamilton Streets in Allentown at the time of the arrests was a normal flow of Saturday traffic, which is heavier than on a week day. [29a] There was no blocking of traffic by the use of the sound equipment on the automobile, nor was there any interference with pedestrian traffic. [33a]

The sound device was checked by an acoustical engineer and sound expert on May 12, 1949. [80a] By using a decibel meter, as well as his own ears, and based on long experience, he said that the sound-amplifying device used by the defendants in the trial could not be heard more than 30 feet away. [82a]

The sound device was also heard by Harvey J. Gensenleiter, one of Jehovah's witnesses, who built the sound equipment on the automobile. [96a-97a] He was at Eleventh and Hamilton Streets as the car passed on the way down to the point where it was stopped, at Seventh and Hamilton Streets. As it passed he could not hear the speaker's voice until the moment it reached the intersection where he was standing on the sidewalk. The sound was not very loud, he said. He had to listen hard in order to hear it distinctly as the device passed. He said it was necessary for him to be about 20 feet from the sound device in the automobile as it passed in order to hear it distinctly. [97a]

The Questions Are Substantial

I. *The section of the ordinance which prohibits completely the use of portable sound devices in the downtown business district of Allentown is void on its face and is*

invalid as construed and applied because it abridges appellants' rights of freedom of speech and freedom of worship, contrary to the First and Fourteenth Amendments to the Constitution of the United States.

The holdings of the courts below that a sound amplifying device may not "be added to each individual's right of freedom of speech" is in direct conflict with the holding of the Supreme Court of the United States in *Saia* v. *New York*, 334 U. S. 558, where the Court said: "Loud-speakers are today indispensable instruments of effective public speech." (334 U. S. 561)

The Court has knowledge of the changes to which municipalities have been subjected by reason of the industrialization of the nation and the progress of science and civilization. These changing times have brought with them many things which of necessity have disturbed the quiet of the thoroughfares and public places. Today, one exercising the right of assemblage and of free speech on a city thoroughfare or in a public place must overcome the handicaps of noises generated by mechanical traffic, industries and other persons and instrumentalities using those places. It has, therefore, become a common practice, in the exercise of freedom of speech, of communication and of assemblage, to use mechanical means to amplify the voice.

In cities during the war emergency, both the Army and Navy as well as the United States Civil Service employ loudspeakers and sound amplifiers attached to motor vehicles on the city streets to effectively reach people and to make known to the public their need for recruits for the armed forces and for various important war jobs. The police departments of some of the cities have such sound systems permanently attached to their motor vehicles which are used on the city streets in the performance of various duties.

Even the Mayor of the City of Allentown employed the sound amplifying device contrary to the terms of the ordinance with impunity after it was made the law of Allentown "in the interests of a United States Government Savings Bond Drive. With disarming candor, the Mayor admitted that in an excess of patriotic zeal and with the remembrance of past practice it had not occurred to him at the time that he was violating his own ordinance." [127a]

The use of speech in the exercise of these constitutional rights is not static, is not confined to peroration of ancient times. The inhabitant of this land, in his exercise of speech, is as much entitled to use modern-day inventions to augment his exercise of that right as he is in exercising his right to freedom of the press to use modern-day printing machinery. Amplifying devices are as much a part of effective exercise of modern-day speech over the radio and in public places as is paper or the printing press essential for effective exercise of freedom of the press. Purely because sound-amplifying devices are relatively new and a departure from traditional practice is no reason for prohibiting their use for lawful purposes any more than would be justifiable the prohibition of use of the printing press because it was relatively modern.

In this day of supersonic airplanes, hydrogen bombs and electronic developments, a loud-speaking apparatus has become a common convenience. Sound-amplifying devices used by speakers bear a necessary relationship to freedom of speech and religion exercised by a preacher acting faithfully and seriously as an obedient servant of his Master (Isaiah 12:6; Matthew 10:27) which must not be prohibited or censored.

In recent years, it has come to be recognized by all that the use of amplifying devices in radio broadcasting and in public speaking in places such as auditoriums, halls and

streets is a necessary and usual ancillary for effective free speech, speech that is intelligible. Without the use of such devices the right of free speech is definitely and seriously curtailed and impaired, if not frustrated entirely. Especially is this true in many cases where the speakers have weak voices. Accordingly, it can now be said that the use of sound devices is a necessary part of the effective exercise of freedom of speech. Therefore the right to interfere with the use of such amplifying devices is limited to the same rules of restraint and regulation as would apply to any restraint upon the exercise of freedom of speech itself. The mere fact that this is an amplifying device does not alone provide the city with new and extraordinary reasons for prohibiting and censoring the use of such device.

The holdings of the courts below are out of harmony with the holding of the Supreme Court of the United States in *Saia* v. *New York*, 334 U. S. 558. In that case the Supreme Court declared to be unconstitutional an ordinance which required a permit for the use of a sound device. The holding of the Supreme Court is in no way weakened by *Kovacs* v. *Cooper*, 336 U. S. 77. According to the majority opinion, which must be taken as the sole basis of determining what was decided by the Court, it confined the case to a determination that an ordinance which forbade "loud and raucous noises" by a sound truck was constitutional. The conviction was sustained because the majority justices assumed that there had been a finding by the New Jersey courts that loud and raucous noises had emitted from the sound device.

The courts below, without any support in the evidence or testimony, assumed that the ordinance was a safety measure and that the appellee had proved clear and present danger of interference with traffic upon the public streets. Nowhere in the evidence was there any proof whatever

that traffic on the downtown streets of Allentown was shown to be interfered with. The court below assumed that the appellee had established such vital point. The failure to prove this missing link in the testimony alone requires a holding that the convictions below were out of harmony with the Constitution and contrary to the decisions of the Supreme Court of the United States.

The City of Allentown cannot rely on the presumption of constitutionality. The court below cannot assume the existence of these vital facts. The City of Allentown has thus far failed to show a *real* (as distinguished from imagined) clear and present danger and has thus not discharged the heavy burden placed upon it where these precious civil rights are infringed.

No evidence was produced here and absolutely no showing made of the need for such an ordinance. Until the City has discharged this burden, by proving a clear and present danger of substantial evils to the community, its attempt to apply and enforce the ordinance cannot be sustained.

The Supreme Court of the United States in *Thomas* v. *Collins*, 323 U. S. 516, held that the clear and present danger test must be applied to abridgment of the liberties protected by the First Amendment. The Court said:

"Choice on that border, now as always delicate, is perhaps more so, where the usual presumption supporting legislation is balanced by the preferred place given in our scheme of the great, the indispensable democratic freedoms secured by the First Amendment." 323 U. S. at pp. 529-530. See also *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153.

The record is barren of any evidence whatsoever which establishes or from which it might be inferred that attention of passing motorists and pedestrians was so diverted

as to create new traffic hazards or that appellants' acts on the occasion of their arrest had that effect. Moreover, there are many things on the public highways and streets which may divert the attention of motorists and pedestrians, for example window displays, billboards, street repairs, jet planes, flashing signs, etc. Even a pretty girl has been known to divert the attention of passing motorists. Yet no court would seriously contend that pretty girls should be barred from the streets and highways, nor that other lawful activities which divert attention, such as wearing placards and distributing handbills, could or should be banned for that reason. The Constitution does not guarantee only those freedoms the exercise of which does not divert attention.

There is no showing here of any sufficiently imminent menace to the city or to the public welfare from the use of sound apparatus as to warrant either the legislative body or this Court in determining that the use of such apparatus is not appropriate any place in the City of Allentown. Appellants' conduct was not said to involve a breach of the peace, commission of a nuisance, disturbance or impeding of traffic. The utterances made over the loud-speaker are not asserted to have been abusive, subversive or in any other respect unlawful.

It is submitted that when a regulation enacted under the police power of a municipality, whether on its face, as applied, or constructively, abridges, prohibits, or infringes upon any of the freedoms guaranteed by the First Amendment to the Constitution, such ordinance or regulation is presumptively invalid; and the burden falls upon the authority asserting the power under the regulation to prove by a preponderance of the evidence that the regulation is a valid exercise of the police power directed at some abuse of the constitutional rights which, unless prohibited or

regulated, would constitute a clear and present danger to the health, safety or general security of the community as a whole. The showing of the abuse is a condition precedent to the exercise of the police power where such exercise or power has a tendency to censor, limit, infringe, restrict or prohibit any of the constitutional freedoms. The police power does not even exist in such cases unless there is clear showing of the abuse. This statement is strongly supported by *Busey* v. *District of Columbia*, 78 App. D. C. 189, 138 F. 2d 592. Mr. Justice Edgerton, speaking for the court, said:

"Freedoms of speech, press, and religion are entitled to a preferred constitutional position because they are 'of the very essence of a scheme of ordered liberty.' (*Palko* v. *Connecticut*, 302 U. S. 319, 325) . . . We think we may hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are invaded. . . . No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms." (138 F. 2d at p. 595)

The courts below held that the use of a sound-amplifying device is equivalent to compelling others to listen to a speaker contrary to their wishes. The fact that a larger range is given to the human voice does not constitute an abuse of free speech so as to justify its abridgment. Amplification of the human voice is not justification for unconstitutional infringement of liberty. *De Jonge* v. *Oregon*, 299 U. S. 353 at 364. Under the guise of regulation the city has prohibited completely the use of the sound-amplifying de-

vice which is protected by the constitutional guarantee of free speech, contrary to the doctrine announced by the Supreme Court of the United States in *Schneider* v. *New Jersey*, 308 U. S. 147; at 161, 162, 164; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303, Compare *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96.

The power of the City to make reasonable regulations for the control of traffic and the use of the streets does not give it the power to prohibit the use of a sound device in the streets.

The only permissible limitation upon the exercise of free speech and concomitant freedoms may be said to be, at most, reasonable regulation as to time, place and manner. Ordinances prohibiting or censoring the exercise of these activities have been held uniformly to be unconstitutional.

"Ordinances absolutely prohibiting the exercise of the right to disseminate information are, *a fortiori*, invalid." *Jones* v. *Opelika*, 316 U. S. 584, 595-596.

The ordinance in question cuts off entirely from the hearer the right to hear effectively a public speech in a public place. It deprives the speaker of the right to be heard intelligibly by his entire audience. It therefore abridges the rights of freedom of speech, communication and assembly. It certainly is not regulatory as to time, place or manner in which one may use a sound-amplifying device in the city. It does not purport to be a revenue-raising measure to bear any excessive police burdens resulting from the use of sound equipment.

While prohibition and censorship are condemned, the Supreme Court of the United States has said that laws *regulating* the exercise of freedom of speech, press and worship are permissible. Notwithstanding, the permissible limit is regulation rather than prohibition or censorship.

The mere fact that the ordinance permits the use of the sound device in the residential area rather than the downtown business district does not make the law a reasonable regulation as to place. Although the law purports to be regulatory as to place, it is actually unreasonable and prohibits under the guise of regulation.

Mr. Justice Roberts condemned this type of ordinance which, in this instance is a ruse that has been resorted to as a part of the scheme to abridge the right of free speech in Allentown, in this language: "But it must not in the guise of regulation be abridged or denied." *Hague* v. *C. I. O.*, 307 U. S. 496, 501, 518.

The limit of the police power permitted by the Constitution is to deal with the abuse of the right of free speech. The use of the sound device, in itself, does not constitute an abuse of free speech. It is only when the sound-amplifying device is used in such a manner as to create loud and raucous noises that it can be dealt with according to law, as was permitted in *Kovacs* v. *Cooper*, 336 U. S. 77. Prohibiting completely sound devices in the only logical area for inviting persons to attend a Bible discourse and announcing the public distribution of literature by the use of such amplifier does not constitute the dealing with an abuse. On the contrary, it is an outright prohibition that may not be allowed even though done under the guise of regulation.

It is respectfully submitted that the provisions of the ordinance are presumed to be unconstitutional; that the burden falls upon the City to prove to the satisfaction of the Court that it is constitutional; that a clear and present danger to a substantial interest of the community has not been shown; and that the City has wholly failed to sustain this burden and has not established that the ordinance is constitutional.

II. Ordinance No. 6068 of the City of Allentown zoning the use of sound devices in the city so as to prohibit within the business district use of sound devices is unreasonable, arbitrary, discriminatory and a capricious exercise of the police power, abridging the constitutional rights of the appellants contrary to the First and Fourteenth Amendments to the United States Constitution.

The Superior Court inadvertently stated that appellants "do not question the reasonableness of the City in the selection of streets where sound trucks are not permitted to be operated." Question Two filed pursuant to Rule 22 of the Rules expressly attacked the ordinance as unreasonable. [129a] Eight pages of the brief which was filed in the Superior Court were devoted to a discussion and argument on this question. See the brief, pages 31-38. The Superior Court was told:

". . . The City has allowed the use of sound devices in the residential area. This is an unreasonable and arbitrary zoning law. The City has chosen the logical and most appropriate places for exercise of free speech and removed such proper places from the reach of the citizen. It has, in lieu thereof, chosen less appropriate places for the exercise of free speech. The downtown business district is the only place in the City where large crowds of people are to be found passing as pedestrians upon the sidewalks or traveling upon the streets.

"The person desiring to reach people by exercise of free speech logically and naturally goes to the places where more people can be reached. No reasonable person desiring to reach an audience through the exercise of free speech would go into an area of the city where people are not to be found upon the streets or sidewalks. The very fact that the City of Allentown has put the only part of the City where audiences can be reached beyond the reach of sound

devices is itself capricious in the extreme, arbitrary and suppressive. In effect the ordinance, while appearing to be a regulatory measure, is absolutely prohibitive.

"Although the ordinance does not, within its prohibitive terms, expressly name all the streets of the city, nevertheless, by including within its prohibitive terms all the streets that are in the downtown business district, that has been accomplished, because all the main streets of Allentown where one would likely desire to exercise freedom of speech would be in such downtown district and not in the out-of-the-way streets that are desolate of travelers. The City has included all the entire business district, which is the only place within the limits of the city where people come in great numbers to shop, attend theaters, make purchases on the market and do other business. If one is denied the right to exercise such activity in that district, then he in fact has been denied the right to exercise such activity in the city, for one would not desire to exercise free speech on a desolate street in the residential area, where only few or no people pass. In fact, the officials of the City of Allentown have stated, 'These named "appropriate places" are denied you for the purpose of exercising your liberty because "it may be exercised in some other place" such as in the unused residential area and other places in the city which are not frequented by visitors.' This is exactly what was condemned by the Supreme Court in *Schneider* v. *New Jersey*, 308 U. S. 147, 60 S. Ct. 146." Brief for appellants in the Superior Court, pages 24-26.

The argument that there may be other places in the City of Allentown where a sound device can be used, such as the residential districts [106a-111a], is of no force and effect and does not sustain the validity of the ordinance. The same argument was made and rejected by the Supreme Court of the United States in *Schneider*

v. *New Jersey*, 308 U. S. 147. In that case it was argued that the ordinances were valid because their operation was limited to streets and alleys which left "persons free to distribute printed matter in other public places". Here the argument is the same. The City of Allentown contends that appellants may operate their sound device on the streets in the residential area, which is declared to be the only appropriate place to use a sound device in the City of Allentown. This argument was rejected by Mr. Justice Roberts in *Schneider* v. *New Jersey*, 308 U. S. 147, as follows:

"But as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

Each court below relied on *Kovacs* v. *Cooper*, 336 U. S. 77, for support that sound trucks can be prohibited because in the *Saia* case, 334 U. S. 558, it was stated that the hours and place of public discussion can be controlled. [126a] Control does not mean prohibit, as the court below said it does. [126a] The Supreme Court in the *Kovacs* case said, "All regulatory enactments are prohibitory so far as their restrictions are concerned, and the prohibition of this ordinance as to use of streets is merely regulatory." It is grossly erroneous to conclude from this statement that sound devices can be prohibited outright. The statement above had reference to the power of the law to regulate by prohibiting *loud and raucous noises*. The Supreme Court of the United States did not hold that a device which is lawful may be prohibited because it can be regulated. While free speech, free press, free worship and free assembly may be regulated as to the hour and place of exercising them, they

can never be prohibited. The Supreme Court of the United States has held that although municipalities have the right to regulate as to time and place of the exercise of rights and also have the power to protect the health and welfare of the people they may not abridge or prohibit the exercise of liberties under the guise of regulation. The City of Allentown and the court below have, under the guise of regulation, abridged and denied the right to use a sound device on the streets of the business district of Allentown, which right is guaranteed by the First and Fourteenth Amendments to the United States Constitution. *Saia* v. *New York*, 334 U. S. 558.

Various courts in the United States have held that ordinances or laws which zone a town so as to forbid completely the distribution of literature on the streets and sidewalks of the business district of a city are invalid. This was the holding in Ex parte *Walrod*, 73 Okla. Cr. 299, 120 P. 2d 783. This case also involved one of Jehovah's witnesses. He was discharged upon application for writ of habeas corpus. The ordinance of the city of Stillwater, Oklahoma, made it unlawful for any person "to pass, distribute or deliver, or cause the same to be done, of advertising matter, printed or written bills or circulars, advertising devices and reading matter on the streets of Stillwater, Oklahoma, and said congested business district is defined . . ." 73 Okla. Cr. at p. 303.

In this case the same argument as appears above was made —that the zoning law excluded this type of activity from the business district for public safety reasons. The city contended that the activity interfered with traffic and disturbed the public welfare of the area. These considerations were brushed aside and given no weight whatever by the Oklahoma court in declaring the ordinances invalid. See also *Jones* v. *Moultrie*, 72 Ga. App. 282, 33 S. E. 2d 561; *Burns* v. *Carrollton*, 72 Ga. App. 628, 32 S. E. 2d 621.

Zoning laws which have excluded churches from certain areas of the city on the grounds that they might interfere with traffic or otherwise imperil public safety have uniformly been declared to be unconstitutional. *State of Florida* ex rel. *Tampa, Florida, Company of Jehovah's witnesses* v. *City of Tampa*, 48 S. 2d 78 (decided October 6, 1950); *Synod of Ohio of United Lutheran Church* v. *Joseph*, 139 Ohio St. 229, 39 N. E. 2d 515; *Howell* v. *Meador*, 109 W. Va., 368, 154 S. E. 876; *Westminster Presbyterian Church* v. *Edgecomb*, 108 Neb. 859, 189 N. W. 617; *Roman Catholic Bishop* v. *Hill*, 59 Nev. 231, 90 P. 2d 217; *Simms* v. *City of Sherman*, 144 Tex. Civ. App. 15, 181 S. W. 2d 100.

The courts below have not performed the 'delicate and difficult task' of 'weighing the substantiality of the reasons' advanced in favor of the law and measuring them with the heavy reasons that abound in favor of appellants' constitutional rights, as Mr. Justice Roberts said the courts should do when considering such conflicts, in *Schneider* v. *New Jersey*, 308 U. S. 147, at page 161.

III. Clarification by the Supreme Court of the United States of the law as to limitations of the use of sound-amplifying devices is needed.

The courts below hold that the power to regulate as to time and place the use of sound devices, which is admitted, gives the power to prohibit. Regulation does not allow prohibition as to all times and all places in the business district of Allentown. The Superior Court supports its opinion with statements appearing in various opinions in *Saia* v. *New York*, 334 U. S. 558 and *Kovacs* v. *Cooper*, 336 U. S. 77. Neither holding supports the court below. The *Saia* decision holds an ordinance which requires a permit to use a sound device to be unconstitutional. The *Kovacs* decision

was merely that a law that prohibited loud and raucous noises emitted from a sound device was valid. The case did not hold that the sound device could be prohibited as a *nuisance*, as has been done in this case. The element of loud and raucous noises is absent in the case.

There is irreconcilable conflict in statements by the justices of the Supreme Court of the United States as to the scope of the police power over the use of sound devices. Two justices only believe that they may be prohibited completely. These are Justice Frankfurter and Justice Jackson. Justice Reed, for the Court, says that they may not be prohibited completely. He also says that unrestrained use of them is not compelled by the Constitution. Mr. Justice Black says that they can be prohibited in business areas. Mr. Justice Reed, for the Court, says they may be prohibited in residential areas but not in all other parts of a city.

It is admitted that the use of sound devices can not be prohibited altogether in a city. Since the majority of the Court, speaking through Mr. Justice Reed, say that they may be prohibited in residential areas, it must be assumed that the majority judges imply that they can be used in the business districts at certain times. The application of the Allentown ordinance has done what seemingly the majority justices say cannot be done. The courts below are supported by only three of the justices, namely, Black, Frankfurter and Jackson. None of the other six justices nor the holdings of the Court in *Saia* and *Kovacs* support them.

Since the sound device is admittedly protected by the Constitution against prohibition and censorship, according to the holdings of the Supreme Court, it, like free speech to which it is ancillary and incidental, may not be prohibited in the business district—especially in the absence of proof that there is some interference with traffic. There is no

such proof or contention that traffic was interfered with in this case.

There must be some place in a city where sound devices may be used! Where is it? If it is admittedly not in hospital zones and in the quiet residential areas, then where is it? If they cannot be used in the residential areas and cannot be employed in the business districts, then are they not prohibited altogether? The mere asking of the questions resounds the answer: there is some place. Where is it? It must be in the areas of the city where there are all other kinds of noises, the business district and non-residential area, the places from which the appellants have been driven by the ordinance and the courts below.

It is, therefore, respectfully submitted that the convictions should be set aside because the ordinance is unreasonable.

The terms of the ordinance providing for prohibition are identical to the prohibitory provisions of other ordinances invalidated by former decisions of the Supreme Court of the United States. No distinction can be made between the condemned provisions of this ordinance and the ordinances involved in the former decisions of the Supreme Court because there is involved the use of a sound-amplifying device. The use of a sound device ancillary to exercise of free speech at any assembly is not *per se* an abuse of free speech, as is not such use in the downtown business district of the City of Allentown. The limit of the police power is to deal with the abuse. Possibility of abuse cannot be avoided by prohibiting. (*De Jonge* v. *Oregon*, 299 U. S. 353, 57 S. Ct. 255; *Schneider* v. *New Jersey*, 308 U. S. 147, 60 S. Ct. 146.)

Because the sound device is a modern-day invention not known to speakers of ancient times does not withdraw its use from the shield of the Constitution. The Constitution

is a living document that is fully capable of coping with the vicissitudes of life and the times through new applications. The printed leaflets or pamphlets cannot be censored or prohibited because their wider distribution through the rotary press has made them noxious to many people. By force of the same reason the amplication of the human voice in speech before an assembly or to passers-by in the street is no ground for the denial by law of use of sound devices.

The ordinance on its face, and as construed and applied, does not purport to be a regulatory law. No attempt is made by the ordinance or the authorities enforcing it to regulate the volume of sound, the time of use, the manner, the appropriate place or the number of sound devices that may be used. The face of the ordinance and the record as to its application and enforcement show indisputably that it is a prohibitory ordinance. The fact that it prohibits unreasonably an adjunct to free speech which is necessary in order to make it effective rather than prohibit the entire right of speech altogether does not save it. The Constitution probihits abridgment. Its restraints are not confined to mere prohibition or censorship of the entire right. Anything which shortens, burdens or curtails the right of free speech is prohibited by the Constitution. It should be apparent to all that the denial of the use of the sound device under these facts and circumstances is an abridgment and curtailment of the effective full right of free speech.

Conclusion

WHEREFORE the Supreme Court of the United States should note jurisdiction for final hearing for the purpose of determining whether or not there has been a departure by the courts below from the usual and accepted practice and which have disposed of important and substantial questions in a way that is in conflict with the Constitution of the United States and applicable decisions of the Supreme Court of the United States.

Respectfully submitted,

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Attorneys for Appellants.

APPENDIX "A"

[134]

IN THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

Nos. 135, 136, January Term, 1951

COMMONWEALTH OF PENNSYLVANIA

v.

PAUL S. GEUSS and ERICH FLEISCHMANN, *Appellants*

Appeals from Judgments of Sentence of the Superior Court at Nos. 138 and 139, October Term, 1950, affirming Judgments and Sentences of the Court of Quarter Sessions, of Lehigh County at No. 46 June Sessions, 1949

OPINION OF THE COURT

Filed June 27, 1951

PER CURIAM:

The judgments are affirmed on the opinion for the Superior Court: see 168 Pa. Superior Ct. 22.

IN THE SUPERIOR COURT OF PENNSYLVANIA

Nos. 138, 139, October Term, 1950

Appeal from the Judgment of Sentence of the Court of Quarter Sessions for the County of Lehigh, at No. 46 June Sessions, 1949

Filed November 14, 1950

Opinion by DITHRICH, *J.*:

This appeal involves the validity of an ordinance of the City of Allentown regulating the use of sound trucks. The

ordinance defines a sound truck as "any motor vehicle . . . having mounted thereon, or attached thereto, any sound amplifying equipment." It is drawn in conformity with the model ordinance, regulating and prohibiting certain uses of sound trucks, adopted by the National Institute of Municipal Law Officers, hereinafter referred to as NIMLO (Report No. 123, 1948).

The principal question to be determined is whether the ordinance bears a substantial relation to the health, safety, morals or general welfare of the people as a whole, as contended for by the City, or is arbitrary, unreasonable and capricious, constituting a denial of due process, as contended for by defendants.

The guiding principle in determining the question was admirably stated by Mr. Justice Roberts in *Cantwell* v. *Connecticut*, 310 U. S. 296, 84 L. Ed. 1213. Speaking for the Supreme Court of the United States, he said, page 308: "When clear and present danger of riot, disorder, *interference with traffic upon the public streets*, or other immediate threat to *public safety*, peace, or order, appears, the power of the State to prevent or punish is obvious." (Italics supplied.)

The appellee takes the position that in the downtown business district of Allentown, as in every city, the "clear and present danger of . . . interference with traffic" and the "clear and present danger of accident" *always* exist. The learned judge of the court below upheld the position taken by the City and said: "As we conceive the purpose of the ordinance, at least so far as the ban on the use of sound trucks on busy streets is concerned, it was rather enacted as a safety measure than merely to protect the citizens from annoyance or to protect their right of privacy."

NIMLO is authority for the statement that municipalities everywhere are seeking actively a solution to the difficult problem which will safeguard freedom of thought and at the same time not unreasonably interfere with freedom of speech. In view of the widespread interest in the question, a brief resume of two vitally important five to four decisions of the United States Supreme Court may be helpful at this point.

Saia v. *New York*, 334 U. S. 558, 92 L. Ed. 1574, the first of the two cases, was decided June 7, 1948. Mr. Justice Douglas in the opening sentence of the majority opinion of the Court said: "This case presents the question of the validity under the Fourteenth Amendment of a penal ordinance of the City of Lockport, New York, which forbids the use of sound amplification devices except with permission of the Chief of Police." Because the ordinance established a previous restraint in the discretion of the Chief of Police, without any standards prescribed for the exercise of his discretion, the ordinance was held to be unconstitutional on its face.

In *Kovacs* v. *Cooper*, 336 U. S. 77, 93 L. Ed. 513, decided January 31, 1949, an ordinance of Trenton, New Jersey, which forbids the use or operation on the public streets of a "sound truck" or of any instrument which emits "loud and raucous noises" and is attached to a vehicle on public streets, was held not to infringe the right of free speech in violation of the First Amendment of the Constitution of the United States made applicable to the states by the Fourteenth Amendment. Mr. Justice Reed announced the judgment of the Court and an opinion in which the Chief Justice and Mr. Justice Burton joined. There was no majority opinion. Separate concurring opinions were written by Justices Frankfurter and Jackson. In the Court opinion, Mr. Justice Reed said, pages 81, 82:

"The use of sound trucks and other peripatetic or stationary broadcasting devices for advertising, for religious exercises and for discussion of issues or controversies has brought forth numerous municipal ordinances. The avowed and obvious purpose of these ordinances is to prohibit or minimize such sounds on or near the streets since some citizens find the noise objectionable and to some degree an interference with the business or social activities in which they are engaged or the quiet that they would like to enjoy. A satisfactory adjustment of the conflicting interests is difficult as those who desire to broadcast can hardly acquiesce in a requirement to modulate their sounds to a pitch that would not rise above other street noises nor would they

deem a restriction to sparsely used localities or to hours after work and before sleep—say 6 to 9 p. m.—sufficient for the exercise of their claimed privilege. . . . *Unrestrained use throughout a municipality of all sound amplifying devices would be intolerable.* [Italics supplied.] Absolute prohibition within municipal limits of all sound amplification, even though reasonably regulated in place, time and volume, is *undesirable and probably* unconstitutional as an unreasonable interference with normal activities." (The sentence last quoted is as it appears in the bound volume, 336 U. S. Reports at pages 81, 82, without the omission of the words "undesirable and probably" between the words "is" and "unconstitutional" as quoted in appellants' brief.)

The opinion continued, page 87:

"City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control. We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities. On the business streets of cities like Trenton, with its more than 125,000 people [Allentown has a population of approximately 100,000], such distractions would be dangerous to traffic at all hours useful for the dissemination of information, and in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of advocates of particular religious, social or political persuasions. We cannot believe that rights of free speech compel a municipality to allow such mechanical voice amplification on any of its streets."

In that case Justices Frankfurter and Jackson, who wrote separate dissenting opinions in the *Saia* case, wrote separate concurring opinions, Mr. Justice Jackson stating in conclusion: "I concur in the present result only for the reasons stated in dissent in *Saia* v. *New York*, 334 U. S. 558, 566." Mr. Justice Black wrote a dissenting opinion in which Justices Douglas and Rutledge concurred. It is interesting to note that the same Justices who were in the

majority in the *Saia* case are in the minority in the *Kovacs* case, with the exception of Mr. Chief Justice Vinson, who is in the majority in the latter case.

Out of the welter of concurring and dissenting opinions in these two cases—three in the *Saia* case; five in the *Kovacs* case—we agree with the learned judge of the court below that: "The *Kovacs* case clearly permits restriction as to time and place of use of sound trucks on city streets. Even the *Saia* case recognized 'The hours and place of public discussion can be controlled.' The use of the two words 'hours and place' implies that there may be an absolute prohibition at certain hours and at certain places. It does not mean that there must be permissible hours at every place. . . .

"The City of Allentown is not depriving defendants of the use of any street for propaganda purposes. It is simply denying them the use of its very busiest streets for propaganda by sound truck."

In the instant case both sides agree that the facts have been succinctly and accurately stated by the trial court in its opinion. A summary of the facts as found by Judge Diefenderfer is as follows. Paul Geuss and Erich Fleischmann, appellants, are members of the Allentown Company of Jehovah's witnesses, a company affiliated with the Watch Tower Bible and Tract Society of 117 Adams Street, New York City. Fleischmann is presiding minister of the Allentown Company, a band of 120 members, with headquarters at 1335 Chew Street, Allentown. On Sunday, May 15, 1949, the Allentown Company had scheduled an address at its headquarters by one C. Marks. To advertise the meeting the Company on the preceding Saturday organized its members into several groups: (a) "sandwich" men with large placards announcing the meeting and handing out printed placards; (b) members distributing Watch Tower publications; and (c) a cruising automobile equipped with an electric amplifier system operated by appellants.

In the late afternoon or early evening of Saturday, May 14, as the automobile was approaching Center Square, the intersection of Allentown's two main thoroughfares, appel-

lant Fleischmann broadcast through the microphone and amplifier one of his prepared statements. Appellants were then placed under arrest. The violation of the ordinance was deliberate in order to test its validity. Appellants registered the automobile with its equipment and complied with all provisions of the ordinance, except that forbidding the use of such equipment on certain streets, including the intersection aforesaid. The ordinance provides in part: "No sound truck with its amplifying device in operation shall be operated on the following streets between the points designated . . ." Every street on which the use of amplifiers is forbidden is a street bearing heavy traffic at every hour of the day and well into the night, and except for two through highway streets is occupied almost exclusively by business. Hamilton Street, on which appellants were operating, is Allentown's main street running east and west, and at the particular location where the violation occurred it is crossed by Seventh Street, the main street running north and south. Traffic at this intersection is especially heavy on a Saturday afternoon.

In the opinion of Judge Diefenderfer, "The law of this case is comparatively simple." He then quotes the following from *Kovacs* v. *Cooper*, supra, pages 85, 86: "'All regulatory enactments are prohibitory so far as their restrictions are concerned, and the prohibition of this ordinance as to a use of streets is merely regulatory. Sound trucks may be utilized in places such as parks or other open spaces off the streets. The constitutionality of the challenged ordinance as violative of appellant's right of free speech does not depend upon so narrow an issue as to whether its provisions are cast in the words of prohibition or regulation. The question is whether or not there is a real abridgment of the rights of free speech. Of course, even the fundamental rights of the Bill of Rights are not absolute. The *Saia* case recognized that in this field by stating "The hours and place of public discussion can be controlled."'"

The lower court continued: "One must not overlook the fact that the city did not forbid advertisement of the meeting or the spread of religious propaganda at the very point where it forbade the use of sound trucks. Defendants com-

pany was permitted to have sandwich men on the sidewalks, where only congestion and not danger resulted. They were permitted to distribute leaflets announcing the meeting and the city patiently assumed the task of gathering the resultant litter. They were permitted to solicit readers or subscribers for the magazines. It seems unreasonable to suppose that anyone who could be persuaded to attend the meeting would do so on the basis of a broadcast rather than from a tangible and permanent printed invitation thrust into his hand or from reading a placard. *Saving souls is undoubtedly more important than saving lives*, but when both can be accomplished by reasonable cooperation, a zealous Christian should be the first to offer such cooperation." [Italics supplied.]

In the dissenting opinion by Mr. Justice Black in the *Kovacs* case, he said, page 104:

"I would agree without reservation to the sentiment that 'unrestrained use throughout a municipality of all sound amplifying devices would be intolerable.' And of course cities may restrict or absolutely ban the use of amplifiers on busy streets in the business area. A city ordinance that reasonably restricts the volume of sound, or the hours during which an amplifier may be used, does not, in my mind, infringe the constitutionally protected area of free speech. It is because this ordinance does none of these things, but is instead an absolute prohibition of all uses of an amplifier on any of the streets of Trenton at any time that I must dissent."

In our opinion the Allentown ordinance is a reasonable regulation as to place. Appellants do not question the reasonableness of the City in the selection of streets where sound trucks are not permitted to be operated. Their objection is that no right of selection exists. On this point the great weight of authority is clearly against them. An ordinance which removes a percentage of the streets of a city from the operation of sound trucks and amplifying devices and is directed solely at the traffic interference caused by them and the resultant hazards to life is a regulation for a proper safety reason and not an abridgment of the right of free speech. There is no absolute right of free

speech with sound trucks or other amplifying devices on city streets, as urged upon us by appellants. The right is subject to curtailment on "busy streets in the business area."

If we were to uphold the contention of appellants it would be tantamount to ruling that a sound truck or other amplifying device may be added to each individual's right of freedom of speech. The result would indeed be intolerable. It is daily becoming more difficult for a person to concentrate on his work in a downtown office building because of the noises apparently necessary and incidental to the conduct of affairs in the life of a modern city. And if the councilmanic bodies of the municipalities are not to be permitted to prohibit the operation of sound trucks and the blare of this ultramodern means of communication on certain streets or in certain areas, then there will no longer be any authority lodged anywhere to safeguard, in the words of Mr. Justice Frankfurter in the *Kovacs* case, page 97, "the steadily narrowing opportunities for serenity and reflection"; and we may add "the steadily narrowing opportunities" to keep the streets open and available for safe movement of people and property, the primary purpose to which streets are dedicated. *Schneider* v. *State*, 308 U. S. 147, 84 L. Ed. 155.

When the *Kovacs* case was before the New Jersey Supreme Court (135 N. J. L. 64, 50 A. 2d 451), the Court put the case for the regulation of sound trucks and amplifying devices very aptly when it said, page 68 of 135 N. J. L. and page 453 of 50 A. 2d: "The freedom to express one's opinions does not contain the right to compel others to listen. The means of expression through a sound amplifier is tantamount to compulsion. The booming voice of a speaker in crowded thoroughfares of the city forcibly attracts the attention of almost all within a wide area. That alleged right was never intended to be guaranteed by either [United States or New Jersey] Constitution," nor, may we add, by the Constitution of Pennsylvania. Since the ordinance in question bears a substantial relation to the health, safety and general welfare of the people as a whole and is not arbitrary, unreasonable and capricious, thus constituting a

denial of due process under the Fourteenth Amendment of the Constitution of the United States, we agree with the learned judge of the court below that it is "a valid exercise of the police power of the City of Allentown, [and] that it does not unreasonably interfere with defendants' right of free speech or the free exercise of their religion."

Freedom of speech on the business streets between the points designated is not prohibited. It is only the amplification of such speech by the means of sound trucks at which the ordinance is aimed. As a safety measure, and there can be no reasonable doubt that that is the purpose for which the ordinance was enacted, its validity cannot be successfully challenged.

Judgment affirmed.

APPENDIX "B"

IN THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

Nos. 135, 136, January Term, 1951

COMMONWEALTH OF PENNSYLVANIA

v.

PAUL S. GEUSS and ERICH FLEISCHMANN, Appellants

ORDER ON PETITION FOR REARGUMENT

September 15, 1951. Petition denied.

Per CURIAM:

Endorsement: In the Supreme Court of Penna. Nos. 135, 136, January Term, 1951—Commonwealth v. Paul S. Guess and Erich Fleischmann, Appellants—Statement as to Jurisdiction—Filed in Supreme Court Oct. 9, 1951, Philadelphia, Hayden C. Covington, Harold Mayberry.

No. 477. GEUSS ET AL. *v.* PENNSYLVANIA. Appeal from the Supreme Court of Pennsylvania. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Kovacs* v. *Cooper*, 336 U. S. 77. MR. JUSTICE DOUGLAS dissents. *Hayden C. Covington* for appellants. *Ralph H. Griesemer* and *Joseph B. Walker* for appellee. Reported below: 368 Pa. 290, 81 A. 2d 553.

Miscellaneous Orders.